SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1323

CONTINENTAL OIL COMPANY, TIDEWATER OIL COMPANY, ATLANTIC RICHFIELD COMPANY, CITIES SERVICE OIL COMPANY, *Petitioners*

v.

FEDERAL POWER COMMISSION, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners[1] pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case, entered December 19, 1966.

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[1] Petitioners are Continental Oil Company, Tidewater Oil Company, Atlantic Richfield Company (Formerly The Atlantic Refining Company), and Cities Service Oil Company.

OPINIONS BELOW

The opinion of the Court of Appeals (App. B, *infra*, pp. 1b-20b) is reported at 370 F.2d 57. Its order denying rehearing (App. B, *infra*, p. 23b) is not reported. The order of the Federal Power Commission (J.A. 641-5)[2] is reported at 32 F.P.C. 1167. Its order denying rehearing (J.A. 645-9) is reported at 32 F.P.C. 1487.

JURISDICTION

The judgment of the Court of Appeals (App. B, *infra*, pp. 21b-22b) was entered December 19, 1966. Its order denying rehearing (App. B, *infra*, p. 23b) was entered January 27, 1967. Jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTIONS PRESENTED

As now limited under opinions of this Court,[3] the Commission's jurisdiction over lease transfers is confined to those which cover "proven and substantially developed" reserves, which are "close in economic effect" to gas sales, and which are made in "interstate commerce for resale." Under the Outer Continental Shelf Lands Act (OCSLA),[4] Petitioners were issued leases covering two 5,000-acre tracts in the Ship Shoal Area, Offshore Louisiana. In 1955, one gas well had

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[2] J.A. references are to the Joint Appendix in the Court of Appeals.

[3] *Rayne* [*United Gas Improvement Company* v. *Continental Oil Company*, 381 U.S. 392 (1965)]; *Panhandle* [*Federal Power Commission* v. *Panhandle Eastern Pipe Line Company*, 337 U.S. 498 (1949)].

[4] Act of August 7, 1953, 67 Stat. 462, 43 U.S.C. 1331, *et seq.* (1964).

been completed thereon and is now shut-in with no gas produced. From 34 to 40 additional completions were then anticipated for development. Out of such leased tracts, Petitioners transferred vast acreage, along with the single gas well. These transfers were approved as assignments of leases by the Secretary of the Interior in whom Congress had vested exclusive jurisdiction to administer OCSLA. The Commission did not and could not make findings articulated with the foregoing limitations fixed by this Court.

(1) Apart from OCSLA, can the Commission regulate the lease assignments as sales of gas?

(2) Confronted with OCSLA, can the Commission appropriate power to nullify official actions of the Secretary approving the transfers as assignments of leases?

STATUTES INVOLVED

The statutory provisions involved include Sections 4(c) and 7(c) of the Natural Gas Act, 52 Stat. 822, 825 (1938), as amended, 15 U.S.C. 717(c), 717f(c) (1964) and also Sections 4(a)(1)(2), 5(a)(1), and 5(c), 67 Stat. 462 (1953), 43 U.S.C. 1333(a) (1)(2); 1334(a)(1) and 1334(c). They are printed in App. A, *infra,* pp. 1a-5a.

STATEMENT

In 1955, subject to the provisions of OCSLA, Petitioners were granted two 5,000-acre leases in the Ship Shoal Area, Offshore Louisiana, by the United States of America (J.A. 90-121). For these leases they paid over $11,000,000 (J.A. 90, 105).

One gas well has been completed; it has been and still is shut-in with no gas produced (J.A. 4-5). Seven

oil wells had been completed and have been producing since 1960 *(ibid.)*. Four dry holes had been drilled *(ibid.)*.

In 1961, for a consideration of over $97,000,000 (J.A. 30), Petitioners transferred the oil leasehold interests under portions of the leases to Tenneco Oil Company and the gas leasehold interests to Tennessee Gas Supply Company (J.A. 23-4, 51-2, 588). These transfers were duly approved as properly qualifying as lease assignments under OCSLA and the regulations of the Secretary of the Interior thereunder (J.A. 604-6).

Following a hearing upon a Commission order directing the Petitioners to show cause why they should not be required to comply with the requirements of the Natural Gas Act, the Commission determined the lease transfers to be sales of gas in interstate commerce for resale and issued the order here under review (J.A. 614-6, 641-5). It denied rehearing and directed that Petitioners make appropriate filings (J.A. 645-9).

The Court below affirmed on the ground that this case is governed by this Court's holding in *Rayne*.[5]

REASONS FOR GRANTING THE WRIT

The opinion below presents two novel questions which are important in the administration of the Natural Gas Act and OCSLA. The first is whether the new criteria prescribed will nullify the limitations laid down by this Court in *Rayne*, expanding Commission jurisdiction to substantially all trading in leases. The second is whether an irreconcilable conflict is created between the Natural Gas Act and OCSLA.

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[5] *Supra*, n. 3.

A. Holding Below Nullifies Rayne Limitations

In *Panhandle,*[6] it was held that "leases are an essential part of production" and that their transfer is beyond the coverage of the Act which exempts production and gathering. In *Rayne,*[7] this Court was careful not to overrule *Panhandle,* but confined it to the facts there involving a transfer of "undeveloped leases" and not involving a "sale of natural gas for resale in interstate commerce."

The resulting rule in *Rayne* limited Commission jurisdiction over lease transfers to those where (1) the gas reserves underlying the leases are "proven and substantially developed," (2) the lease transfer is close to a gas sale in its "economic effect" upon the parties, and (3) the lease transfer is a sale of gas in "interstate commerce for resale."[8]

The Court below recognized this as the three-pronged test of *Rayne (infra,* p. 8b), concluding that:

> "The crucial fact here, as in Rayne, is that the assignment of the leases accomplished the transfer of large amounts of substantially proven off-shore natural gas reserves to an interstate pipeline company for eventual resale in interstate commerce. The transaction was a sale of a definable volume of gas, the price of which was geared to the actual volume found, and payment for which was directly related to its production—even if there has also been a transfer of an interest in real property" *(infra,* p. 20b).

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[6] 337 U.S. at 505, 515.

[7] 381 U.S. at 403-4.

[8] 381 U.S. at 396-400.

However, these sweeping judicial conclusions do not rest upon findings of the Commission and are demonstrably contrary to the facts.

(1) *Ship Shoal Reserves Not Proven or Substantially Developed.*—The Commission did not and could not find that the Ship Shoal reserves were "proven." Nor did it or could it find that such reserves were "substantially developed."

Under accepted and unquestioned industry definitions, proven reserves are those shown to be recoverable with "reasonable certainty."[9] There was *no* evidence that reserves underlying the vast acreage were "proven." The impossibility of such a finding is underscored by the fact that only one gas well had been completed, no gas had been produced, and at the time of transfer 34 to 40 completions were anticipated for development (J.A. 38). The Commission correctly found, therefore, that Tennessee obtained an "unascertained amount of gas," since it could not "tell how much gas it is getting," and that it was accordingly getting a "pig in a poke," as the Commission graphically put it (J.A. 630).

The facts here thus stand in sharp contrast to *Rayne* and to *Bastian Bay.*[10] As the Court below recognized, the Commission had held Rayne to be "fully developed"

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[9] See, *e.g.*, Society of Petroleum Engineers, "Journal of Petroleum Technology," p. 815, July, 1965; "Proven Reserves of Crude Oil, Natural Gas Liquids and Natural Gas," p. 6, December 31, 1964, published jointly by the American Gas Association, Inc., the American Petroleum Institute, and the Canadian Petroleum Association.

[10] *Federal Power Commission* v. *Pan American Petroleum Corporation*, 381 U.S. 762 (1965), rev'g, 339 F. 2d 694 (10th Cir., 1964).

(infra, p. 13b). It likewise recognized the contrast to Bastian Bay where the seller had drilled 32 wells and achieved 21 oil completions and 20 gas completions *(infra,* p. 13b). But here there is no denying that the "properties were a long ways from being developed" (J.A. 38).

In this dilemma, the court below devised a new test to confer jurisdiction, one quite different from the "proven and substantially developed" test fixed by *Rayne.* This new test is:

> "Have the leaseholds been sufficiently proved and developed for imminent production of natural gas in commercial quantities? Two criteria emerge from this standard. One is definability of gas volume based upon proof of reserves; the other is imminent ability to produce in commercial quantities" *(infra,* p. 12b).[11]

As for imminence of production at the time of transfer in 1961, no gas has been produced in the six succeeding years. Neither this test nor the "commercial quantities" test was even mentioned or suggested by the Commission. The latter test was first suggested by counsel for the Commission in an obvious effort to escape the effect of the absence of substantial development at Ship Shoal.[12] But neither they nor the court below suggested what might be the compass of the "com-

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[11] The court below added that the Commission had made "numerous findings" justifying the court's holding that the leases were "proven and substantially developed." Such findings were not and cannot be identified.

[12] See "Brief for Federal Power Commission," filed in the court below, p. 16.

mercial quantities'' test.[13] In any event, no such determination was made here.

As a substitute for facts permitting a determination of substantiality of development, the court below turned to Tennessee's "faith" that reserves could be found as hoped, and its "readiness" to connect its lines to Ship Shoal (*infra,* pp. 14b-16b). It is true that Tennessee risked a payment of over $97,000,000 for the oil interests, when seven oil wells had been completed, and for the gas interests, when only one gas well had been completed. But if such "faith" were an acceptable substitute for substantiality of development, the lease by the United States to Petitioners would have become a conventional sale of gas, since Petitioners risked a payment of over $11,000,000, prior to *any* oil or gas exploration and development (J.A. 90, 105). Moreover, the record shows without dispute that the shorter the production history of a field, the less fully it is developed and the wider will be the variations in reserve estimates (J.A. 39-40, 77); here there is *no* history of production. Such variations will be greater until a

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[13] It is clear that the court below had a very confused understanding of gas volumes. By way of illustration, in their petition to the court below for rehearing, Petitioners noted:

> "It is evident in any event that the Court has a confused concept of gas quantities generally. For example, witness its reference to the 65,000 MMcf of natural gas taken by Texas Eastern from Rayne prior to January 1, 1961, as '65,000 Mcf' (Slip Opinion, p. 16), its reference to the 990,000 MMcf of total estimated recoverable Rayne reserves as about '990 Mcf' (*ibid.*), and its reference to Tennessee's estimate of 550,000 MMcf of net reserves recoverable from Ship Shoal as '550 Mcf' (*id.*, p. 17), among other gas volume errors" (p. 4).

Some but not all of these illustrative volume errors were later corrected in the subsequently printed version of the opinion of the court below.

field is fully drilled up so that the areal extent is known and there is production history over a period of years under operating conditions (J.A. 15-6); here there has been no gas production.

The court below sought support from the fact the contract redetermination provision specified a gas reserve figure (*infra*, pp. 4b-5b, 14b-15b). But the evidence is undisputed that this figure served "only as a base for computing the purchase price adjustment following redetermination," being merely "an arbitrary figure acceptable solely for this purpose" (J.A. 6, 29). It did not represent an "agreement" among the parties as to reserves (J.A. 29). It thus has no inherent engineering significance as to reserves present in fact, but is instead merely a component for use in redetermination at the end of the seventh year (*ibid.*). It therefore lacked even tentative significance as an estimate. Indeed, from an engineering standpoint, the parties could not have ascertained a definite or definable volume of gas at the time of transfer (J.A. 7).[14]

Nor can the court below gain support from its assertion that Tennessee was "ready" to connect the Ship Shoal reserves. Putting aside its reliance here upon matters *dehors* the record, the court below overlooked the fact that Tennessee would be compelled to proceed with development work following the transfer. Thus, it could not determine until later whether to construct

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[14] The court below asserted that Petitioners had "conceded" that such a determination "down to the last cubic foot" could not be made even after a well has been fully depleted (*infra*, p. 15b). This is no concession. It is merely a truism deriving from the fact that an undefinable volume of gas will remain in the reservoir after depletion, since only a portion of the reserves is recoverable (J.A. 8-10).

the connecting pipeline, depending on the results from further drilling to determine economic feasibility.

(2) *Ship Shoal Not a "Sale" in Economic Effect on Parties.*—This Court held that the *Rayne* lease-sale agreements "were such that they were very close in economic effect to conventional sales of natural gas." [15] Fifteen—essentially all—of the economic factors considered and enumerated by this Court in *Rayne* do not appear here.[16] In *Rayne,* the Commission expressly held that the difference between the conventional sale and the successor leasehold transfer is a difference "solely in the contractual arrangements." [17] Such a finding was not and could not be made here.

In holding that in economic effect the Ship Shoal lease transfers do not "differ enough" from a conventional sale to defeat Commission jurisdiction, the court below dealt with only a few aspects (*infra,* pp. 8b-11b). As to these, it overlooked entirely the substantive variance in economic consequences.

First, noting that Petitioners called for and received separate offers for conventional sales and for lease transfers, the court concluded that the $1,149,000 difference, available to *each* Petitioner, between the estimated cash flow under a gas sale and that under a lease sale is not a "significant difference," but goes "more to the method of payment" (*infra,* p. 9b).

But far more is involved than method of payment. The million dollar difference is founded upon differ-

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[15] 381 U.S. at 396.

[16] 381 U.S. at 395-7.

[17] *Texas Eastern Transmission Corporation,* 29 F.P.C. 249, 251 (1963).

ences in economic consequences. The court below failed to recognize the economic impact of the fact that Petitioners had to participate in further lease acquisitions, requiring large sums of money, if they wished to maintain their position in the offshore area (J.A. 13); that they wanted to get their investment back as soon as possible (*ibid.*); that they wanted the quick cash from the downpayment and an early payout through the relatively short period of installment payments (J.A. 14); that a lease transfer entailed a 25 per cent capital gains tax rate, as compared with a 52 per cent rate under continuous operations (J.A. 20); that earnings under a conventional sale would be received over a period upward to thirty years, in contrast with total payment under a lease transfer within seventeen years (*ibid.*); that earnings received after twenty years have relatively little value today (*ibid.*); and that no additional investment in development through additional wells would be necessary under a lease transfer (J.A. 20, 37).

Moreover, the million dollar difference for each Petitioner represents part of the additional consideration the purchaser was willing to pay for his expectation that the oil and gas found would be more than sufficient to justify the total purchase price, in sharp contrast to a conventional sale where the prospect of such benefits or detriments is left with the seller.

Second, although expressly aware that the *Rayne* lease sales covered no minerals except natural gas and condensate and that the sellers were to continue the bulk of the production work, the court below nevertheless brushed aside the fact that the Ship Shoal transaction conveyed *all* mineral interests and vested control *exclusively* in the buyer (*infra,* pp. 9b-11b). It

apparently rested this conclusion solely upon the fact that Tennessee was given an option to require Petitioners to purchase any crude oil produced at the average posted price, the court saying:

> "This may not be a 'wash sale' in the usual sense, but it is clear that Catco's obligation to repurchase the crude oil represents a significant retained interest in Ship Shoal" (*infra*, p. 10b).

Here again, the court below overlooked the decisive economic difference from *Rayne* in that Tennessee assumed the entirety of the gamble that more or less than enough oil would be recovered to justify the purchase of the oil leasehold interests, regardless of who might buy the oil when produced.

Third, still other economic differences were overlooked by the court below. For example, it disregarded totally the uncontroverted, extensive, and detailed testimony of an outstanding banker—based on many years of experience in financing oil and gas operations—that the Ship Shoal lease transfers are assignments of leases in their financial effect and impact upon the parties and that they do not in the least resemble sales of gas (J.A. 62-77).[18]

(3) *Ship Shoal Not a Sale "In Interstate Commerce of Natural Gas For Resale."*—In holding that the Ship Shoal lease transfers constitute sales of gas "in interstate commerce of natural gas for resale"—a pre-

[18] It also disregarded entirely the uncontroverted expert testimony of a distinguished Louisiana lawyer, based upon a careful and detailed analysis of the Ship Shoal transaction, that it is comprised of transfers of leasehold interests and not of sales of gas, a conclusion which he rested upon four different groups of specific legal considerations (J.A. 86-9).

requisite to Commission jurisdiction—the court below relied upon two considerations. Posing the question whether the transfer was "for purpose" of interstate transmission and sale (*infra*, p. 8b), it said that Tennessee had shown an "unequivocal intention" to connect the reserves with its interstate system (*infra*, p. 17b).

But jurisdiction does not rest on the transitory state of mind of a party to the transaction. It has long been established that "Importation into one state from another is the indispensable element, the test, of interstate commerce." [19] Here, there has been no production and no movement of gas anywhere.

In such circumstances, this Court has held that not even the filing of a certificate application for authority to make a sale in interstate commerce of natural gas for resale can constitute a "dedication to the interstate market of the gas recoverable under these leases." [20] Hence, it is not possible to make the prerequisite finding that any gas produced will be sold in interstate commerce for resale or that it *"will have to be transported across state lines for sale"* (*infra*, p. 17b, court's emphasis). For Tennessee would be free to make a nonjurisdictional sale of gas for direct industrial consumption, if and when any is produced. Or it could use any such gas for its own nonjurisdictional consumption, as in a chemical or fertilizer plant. Or

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[19] *E.g., International Text-Book Company* v. *Pigg*, 217 U.S. 91, 107 (1910).

[20] *The Atlantic Refining Company* v. *Public Service Commission of the State of New York*, 360 U.S. 378, 387 (1959). The court below thus assumed the point at issue in observing that the Commission "cannot abstain from exercising jurisdiction of petitioners' sales" because certificates might be rejected if issued (*infra*, p. 18b).

it could make a nonjurisdictional disposition through on-site liquefaction and transportation to countries outside the United States, never crossing any state line.

Here, there can be no certainty that any gas will ever be sold in interstate commerce for resale. Not so in *Rayne*. There, soon after completion of the 1958 lease sales, Texas Eastern began to receive gas for interstate transportation; when the Commission asserted jurisdiction and at the time of judicial review there had been several years' history of transportation and sale in interstate commerce for resale (381 U.S. at 397). Here, even now no gas has been produced, sold, or moved anywhere.

(4) *Only One Short Step to Jurisdiction Over All Lease Transfers.*—As shown above, acceptance of the opinion of the court below would subvert both the form and substance of the tests established in *Rayne*. In turn, this would lead to an expansion of jurisdiction to cover all lease transfers.

In *Ship Shoal,* the Commission did not and could not find that the reserves are either proven or substantially developed. In an attempt to fill that void and support the Commission's assertion of jurisdiction, its counsel proposed their own "commercial quantities" test. In adopting that test, the court below announced two criteria: "definability of gas volume based upon proof of reserves" and "imminent ability to produce in commercial quantities." The Ship Shoal facts plainly do not permit satisfaction of the first criterion, and it is significant that neither the Commission nor the court endeavored to articulate any such criterion with those facts. This is also true of the second criterion, and we suggest that it is not satisfied by the

court's resort to Tennessee's "faith" or its "readiness" to connect.

If the need to show that the reserves are "proven and substantially developed" can be satisfied by the presence of a single well on vast acreage transferred, with not one Mcf produced, there remains but a very short step to jurisdiction over all lease transfers. And despite this Court's limiting preservation in *Rayne* of the rule of *Panhandle*,[21] that rule would then be obliterated, along with *Rayne's* limitations, a course already being charted to jurisdiction over all lease transfers.[22]

B. Federal Law Forecloses Holding the Ship Shoal Transaction To Constitute a Sale of Gas

Independently of *Rayne* and the considerations discussed above, there is yet another bar to commission control over the Ship Shoal lease transfers. Holding that the Commission has jurisdiction over a transfer of leases issued under OCSLA, the Commission and the court below have adopted an interpretation of OCSLA

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[21] *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498 (1949).

[22] Witness the Presiding Examiner's legislative dissatisfaction with *Rayne* and *Panhandle* in his initial decision, issued December 15, 1966, in *Tennessee Gas Pipeline Company, et al.*, Docket Nos. CP65-356, *et al.*, mimeo. ed., p. 37:

> "5. The 1949 Panhandle case contains no language whatsoever that warrants a distinction between 'developed' and 'undeveloped' leaseholds as a *ratio decedendi*. The distinction simply does not exist except as a part of *Rayne Field*; a part which on sufficient showing, the Supreme Court will no doubt eliminate. The fact is that the 1949 Panhandle case has been moribund ever since *Phillips* and even before; the breath of life that remains has been pumped in by the Court's acceptance of a legalistic distinction-without-a-real-difference pressed upon the Court by Government counsel."

which needlessly places it in irreconcilable conflict with the Natural Gas Act, contrary to the established requirement that such a conflict be avoided where possible.

The holding below would invest the Commission with power to destroy the authority of the Secretary of the Interior under OCSLA. Congress vested in the Secretary of the Interior the duty to administer the provisions of OCSLA "relating to the leasing of the outer Continental Shelf" and to prescribe the necessary rules and regulations.[23] And it is affirmatively evident that Congress did not make this delegation in 1953 without an awareness of the authority it had vested in the Commission in the 1938 Natural Gas Act. For in OCSLA it delegated to the Commission certain limited duties in connection with conditions in pipeline rights-of-way,[24] but none with respect to leases.

The uncontroverted and only relevant evidence of record shows that the Ship Shoal transaction properly qualified as assignments of leases under OCSLA and the applicable regulations. They served to achieve the changes in the relationships among the parties in the manner contemplated by such a property transfer, in contradistinction to what their rights would be under the OCSLA regulations if the transaction were to be construed a sale of gas. The Manager of the Bureau of Land Management in New Orleans advised that the proposed transaction would constitute an assignment of leases but that certain features would require approval by both the Director and the Secretary (J.A. 54-5). Accordingly, the obtaining of the required ap-

[23] 43 U.S.C. 1334(a)(1); *infra*, pp. 4a-5a.

[24] 43 U.S.C. 1334(c); *infra*, p. 5a.

proval was made a condition precedent to the completion of the assignment (J.A. 56). As finally drawn, the assignments were accorded the necessary official approval by the Director and Acting Secretary, and the record title was found to be held by the assignees (J.A. 600-3).

But the Commission could obviously direct that all of these transfers be undone if, as the court below held, it had jurisdiction to regulate each transaction as a conventional sale. For the Commission would need do no more than refuse the certificate which would then be required, thus nullifying entirely the authority of the Secretary as established by Congress in OCSLA. It is manifestly impossible for a transaction to be, at once, a Secretary-approved transfer of leases and a Commission-disapproved application for authority to make a conventional sale of gas.

Significantly, the court below ignored entirely this demonstrated incompatability between the two statutes arising from the court's interpretation.[25]

For an additional and separate reason, the Commission and the court below erred in holding that the transfer of the Ship Shoal leases under OCSLA can

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[25] There would be a vast difference in the economic consequences upon Petitioners as lessors. Since the transaction was treated as a transfer of leases, they were required to pay, in addition to regular royalty payments, a minimum payment of $3.00 per acre because the leases were segregated as to oil interests and gas interests (J.A. 58). As to the unassigned acreage below the M-1 sand, they were required to pay a total of $30,000.00 a year in minimum royalty or rental payments (*ibid.*). But if the transaction be construed as a conventional sale, with the products treated as "production," Petitioners presumably would immediately have become liable for royalty of 16⅔ per cent of the value of the products sold (J.A. 93-5). The total consideration was $97,333,333 (J.A. 30).

be treated as a conventional gas sale regulable under the Natural Gas Act. Under OCSLA, Congress extended the coverage of the Constitution and laws of the civil and criminal jurisdiction of the United States to the Outer Continental Shelf "to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State: *Provided, however,* That mineral leases on the outer Continental Shelf shall be maintained or issued only under the provisions of" OCSLA.[26] To the extent applicable and not inconsistent with OCSLA or other federal laws or regulations of the Secretary of the Interior, Congress declared that the civil and criminal laws of each adjacent state to be the law of the United States for that portion of the subsoil and seabed of the Outer Continental Shelf, which would be within the area of the state if its boundaries were extended seaward to the outer margin of the Outer Continental Shelf.[27] In this case, Louisiana is the adjacent State.

Absent any inconsistency thus proscribed, therefore, the law of Louisiana was declared by Congress to be federal law for purposes of determining, among other things, whether a particular instrument constitutes an assignment of a lease or a sale of hydrocarbons, within the meaning of OCSLA and the applicable regulations of the Secretary of the Interior. Under Louisiana law, and thus perforce under federal law, the Ship Shoal transaction cannot be held to constitute a sale of gas. As this Court observed in *Rayne,* Louisiana law does not recognize a sale of gas in place.[28] In this con-

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[26] 43 U.S.C. 1333(a)(1); *infra,* p. 3a.

[27] 43 U.S.C. 1333(a)(2); *infra,* pp. 3a-4a.

[28] 381 U.S. at 400; *infra,* pp. 18b-19b; *Frost-Johnson Lumber Co. v. Salling's Heirs,* 150 La. 756, 91 So. 207: LSA-Rev. Stat. Tit. 9, § 1105 (1962 Cum. Supp.); LSA-Code of Civ. Proc., Art. 3664.

text, the Ship Shoal transaction cannot be construed as a sale of gas (J.A. 78-84).

This conclusion is unaffected by anything in *Rayne* or the Natural Gas Act. In *Rayne,* this Court held that the onshore lease sales there involved "can" be considered sales of gas, rejecting a contention that this result was barred by the law of the State of Louisiana which does not recognize a sale of gas in place.[29] It was persuaded that this is a permissible result under the Natural Gas Act notwithstanding the "technical concepts of local law" (*ibid.*).

But even though elsewhere permissible, Congress decided in OCSLA that such a result cannot be reached on the facts of the *Ship Shoal* case. We are not here concerned with "local" law but with a declaration by Congress as to what shall constitute federal law. The 1953 determination by Congress in OCSLA to make the law of Louisiana the federal law applicable to leases issued under OCSLA was a decision made years after passage of the 1938 Natural Gas Act. As already noted, however, Congress gave certain limited authority to the Commission over pipeline rights-of-way, but none with respect to leases. On the contrary, it expressly provided that mineral leases on the Outer Continental Shelf shall be issued or maintained only under the provisions of OCSLA.[30] It gave the Commission no authority to nullify official acts of the Secretary in discharging his delegated duties.

The court below brushed these considerations aside, holding that there is no conflict between Louisiana law applied through OCSLA, on the one hand, and the

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[29] 381 U.S. at 400.

[30] 43 U.S.C. 1333(a)(1); *infra,* p. 3a.

Natural Gas Act, on the other. Under its view, the law of Louisiana is not applicable since inconsistent with the Natural Gas Act.

This assumes the point at issue. Unlike this Court's holding in *Rayne,* the court below held that these lease sales *must* be considered conventional sales of gas. This needlessly makes the statutes irreconcilable, for it confers power upon the Commission to nullify authority vested exclusively in the Secretary. Such a conflict should and can here be avoided. This Court held that Congress provided for commission jurisdiction over some but not all lease sales and that this jurisdiction "can" be asserted notwithstanding requirements of local law. It did not hold that such jurisdiction *must* be asserted in derogation of another and later federal statute.

Harmony will be assured if the Commission has power to regulate the sale and transportation of gas when produced, recognizing as this Court has held that the gas will not be dedicated to the interstate market before commencement of deliveries, thus preserving the exclusive authority in the Secretary of the Interior over the issuance and maintenance of leases under OCSLA in accordance with the mandate of Congress.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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